Supreme Court, U.S.
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No. 93-702

In The

Supreme Court of the United States

October Term, 1993

NENITA S. VILLAR, et al.,

Petitioners,

v.

CROWLEY MARITIME CORPORATION, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1.

Faced both with the petitioners' motion to remand and the foreign defendants' motion to dismiss for lack of personal jurisdiction, the district court ruled that it had the discretion to consider the motion to dismiss first. The court ruled that the plaintiffs had failed to make a prima facie showing that the foreign defendants were subject to jurisdiction in Texas. In the alternative, the court ruled that if it considered the motion to remand first, the defendants had shown there was no possibility that the foreign defendants were subject to jurisdiction in Texas. Does the alternative ruling, which petitioners have ignored, render moot petitioners' contention that the district court should have considered the motion to remand first?

2.

A. Did the district court abuse its discretion in denying petitioners' request for additional discovery, where at the time of the denial the case had been litigated for over ten years in three different courts?

B. Did the district court abuse its discretion in disregarding the affidavit of John Runion, which the district court found utterly untrustworthy and improper because the witness was a non-lawyer whose affidavit was replete with legal conclusions that were based on blatant misrepresentations of the evidence?

QUESTIONS PRESENTED FOR REVIEW – Continued

3.

A. Where this case was properly removed from state court, did the federal district court properly dismiss for *forum non conveniens*, rather than return the case to state court?

B. Did the federal district court properly apply federal *forum non conveniens* law?

C. Should this Court conduct a sweeping reexamination of the doctrine of *forum non conveniens*?

4.

Did the district court abuse its discretion in imposing sanctions on petitioners' counsel for making unreasonable arguments unsupported by the law or the facts and for relying on an affidavit that contained blatant misrepresentations that were either known to counsel or were easily discoverable?

LIST OF PARTIES

Nenita S. Villar

Josephine Villar

Gerardo Villar

Reynaldo Villar

Renerio Villar .....Petitioners

Crowley Maritime Corporation

GTO Corporation

Genstar Corporation n/k/a WTO Corporation

Fednav Ltd., Successor in Interest by Merger to Federal Commerce & Navigation, Ltd.

Federal Pacific Ltd.

Ross Insurance Limited, Successor in Interest to Genstar Overseas, Limited

Saudi Arabian Transport Organization Ltd.....Respondents

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

Respondents, Crowley Maritime Corporation, Crowley Maritime International, S.A., GTO Corporation, n/k/a WTO Corporation, Genstar Corporation, Fednav Ltd. (successor in interest by merger to Federal Commerce & Navigation, Ltd.), Federal Pacific Ltd., Ross Insurance Limited (successor in interest to Genstar Overseas Limited) and Saudi Arabian Transport Organization Ltd., file this brief in opposition to petitioners' petition for certiorari.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 990 F.2d 1489 and is reproduced in petitioners' appendix, A88-A144.

The opinion of the United States District Court for the Southern District of Texas is reported at 780 F. Supp. 1467, and is reproduced in petitioners' appendix, A1-A87.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioners contend this case concerns the construction and application of 28 U.S.C. §§ 1359, 1441, 1446, 1447; §§ 17.044 and 71.031, Texas Civil Practice and Remedies Code; and § 1396-8.13 and 8.13(7), Tex.Rev.Civ.Stat.Ann. This case does not concern the construction of any of those statutes. Nowhere in the opinions below are those statutes construed.

STATEMENT OF THE CASE

(i) Procedural History and Disposition in the Courts Below:

Petitioners' Statement of the Case is inaccurate and incomplete. Petitioners ignore the fact that the lower court decisions were based on alternative grounds, which render moot many of the arguments raised by petitioners. In addition, petitioners have grossly misstated and mischaracterized the undisputed evidence in this case, particularly the evidence regarding the interrelationships

among the defendants. The opinions of the courts below accurately set forth the facts, which are in many important instances diametrically opposed to the statements of the petitioners.

This is the third successive suit petitioners have brought in United States courts for the death of Renerio Villar, a Philippine seaman who drowned in Saudi Arabian waters in March, 1977. Plaintiffs are the survivors of the decedent. Petitioners brought their first suit on February 27, 1980 in the United States District Court for the Northern District of California. After extensive discovery, conducted in part by petitioners' present counsel, Benton Musselwhite, that court found that Philippine law governed the case and dismissed for *forum non conveniens* on August 14, 1984. That dismissal was conditioned upon the defendants' agreement to waive all jurisdiction, venue and statute of limitations defenses in the Philippines, provided the plaintiffs refiled in the Philippines within one year. The Court of Appeals affirmed that decision on February 14, 1986. *Villar v. Crowley Maritime Corp.*, 782 F.2d 1478 (9th Cir. 1986). Rather than comply with the federal court's directions, the petitioners next filed suit on April 8, 1986 in California state court. The trial court dismissed for *forum non conveniens* and the California Court of Appeals on December 17, 1990 affirmed in an unpublished opinion.

Petitioners again eschewed filing in Philippine courts and instead filed the present suit in Texas state court on February 14, 1991. Respondent Crowley Maritime Corporation ("CMC"), a Delaware corporation with its principal place of business in California, promptly removed the case to federal court on diversity grounds. CMC alleged

that the numerous foreign corporations petitioners had named as defendants were not subject to personal jurisdiction in Texas and were fraudulently joined to defeat diversity. After the suit was removed the foreign defendants moved to dismiss for lack of personal jurisdiction, and CMC moved to dismiss for *forum non conveniens*. Petitioners moved to remand.

Faced with the foreign defendants' motion to dismiss and the petitioners' motion to remand, the district court exercised its discretion to rule first on the motion to dismiss. The court held that the plaintiffs had failed to make a prima facie showing that the defendants were subject to jurisdiction in Texas. However, the court alternatively ruled that even if it considered the motion to remand first, the defendants had shown there was no possibility that the foreign defendants were subject to personal jurisdiction in Texas. Having disposed of those motions, the court ruled that the motion to dismiss for *forum non conveniens* should be granted, based on the *res judicata* effect of the prior California dismissals, and in the alternative, based upon an independent examination of the *forum non conveniens* issue by the court.

The district court denied the petitioners' request for additional discovery on the jurisdictional questions because there had been extensive discovery on the same factual matters in the California litigation. Recognizing that the *forum non conveniens* issue and the jurisdictional issues were not identical, the court nevertheless found that the evidence developed in the California litigation related to both issues. In another evidentiary ruling, the court found that the affidavit of John Runion, submitted by the petitioners as their chief evidence concerning the

jurisdictional issue, was completely untrustworthy and unsatisfactory. Runion, testifying as a supposed expert, was not a lawyer. But his affidavit was replete with legal conclusions, including his opinion that CMC was the "alter ego" of the alien defendants, and that the alien defendants were "doing business" in Texas. The district court found Runion was not competent to render those opinions and, further, that those opinions were based on blatant misrepresentations of the evidence and wholly unwarranted assumptions of facts.

Lastly, the district court imposed sanctions on petitioners' counsel for making numerous frivolous arguments that were not supported by the facts or the law and for submitting Runion's affidavit, which contained misrepresentations that were known to counsel or that were easily discoverable.

The Fifth Circuit affirmed in all respects. The Fifth Circuit ruled that the district court had the discretion to consider first the motion to dismiss for lack of personal jurisdiction, rather than the motion to remand. Petitioners argued there, as they do in their present petition, that by considering the motion to dismiss first, the district court placed an improper burden on them to prove a prima facie case of jurisdiction, whereas if the district court had considered the motion to remand first it would have required the defendants to prove there was no possibility the foreign defendants were subject to jurisdiction in Texas. The Fifth Circuit ruled that this argument overlooked the plain fact that the district court ruled in the alternative that the defendants had proved there was no possibility that the foreign defendants could be subjected to personal jurisdiction in Texas. The court ruled the

district court had not abused its discretion in denying the plaintiffs additional discovery or in refusing to give any credit to the affidavit of Runion.

On the merits of the jurisdictional issue, the Fifth Circuit affirmed the district court because the foreign defendants did not have sufficient minimum contacts with Texas and, further, subjecting the foreign defendants to jurisdiction in Texas would offend traditional notions of fair play and substantial justice. The Fifth Circuit ruled that the district court had properly applied federal *forum non conveniens* law and had properly dismissed.

The Fifth Circuit ruled that, assuming the district court had the discretion to remand rather than dismiss for *forum non conveniens*, there was no abuse of discretion in choosing to dismiss. Finally, the Fifth Circuit found no abuse of discretion in sanctioning the petitioners' counsel, who continued in the Fifth Circuit to make the same frivolous arguments they had made to the district court. Petitioners persistently repeat those same arguments in this Court.

(ii) Statement of the Facts:

Petitioners' Statement of Facts is in truth a succession of highly argumentative legal conclusions that have no basis in the uncontradicted facts. For example, petitioners repeatedly mischaracterize the foreign defendants as "subsidiaries" of CMC, when both of the lower courts have ruled that there is no basis whatever for such a conclusion. Respondents will not unduly lengthen this brief by attempting to point out every misstatement and

mischaracterization of the evidence by petitioners. The evidence is accurately recounted in detail in the district court's opinion, 780 F. Supp. at 1471, 1478-79; app. A3-A7, A38-A43). The actual facts are uncontradicted and unassailable.

At the time of his death Renerio Villar, a citizen of the Philippines, was employed by Saudi Arabian Transport Organization, Ltd. ("SATOL"). He was assigned to the Tug BANNOCK, a Panamanian flagged vessel. Sixty percent of SATOL's stock was owned by GTO Corporation ("GTO"), a Liberian corporation, and the other forty percent was owned by Yusuf Bin Ahmed Kanoo ("Kanoo"), a Saudi Arabian corporation. None of the defendants had any ownership interest in Kanoo. GTO was part of a larger joint venture between Crowley Maritime International, Inc. ("CMI"), Genstar Overseas, Ltd. ("Genstar Overseas"), and Federal Pacific Ltd. ("Federal Pacific").[1] The undisputed evidence showed that CMC did not dominate either SATOL or GTO. SATOL had eight directors, only two of which were connected to CMC. The other six directors were supplied by the other three owners, who each supplied two directors. GTO had seven directors,

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[1] CMI was an inactive Panamanian corporation that was a subsidiary of CMC. Genstar Overseas was a Bermuda corporation that was a wholly-owned subsidiary of Genstar International, S.A., a Luxembourg corporation. Genstar International was subsequently wound up and merged with Ross Insurance, Ltd., a Bermuda corporation. Federal Pacific is a Bermuda corporation, which had no connection with Federal Commerce & Navigation Ltd. at all until the latter was acquired by Fednav Ltd., the parent of Federal Pacific. The district court's opinion, 780 F. Supp. at 1471, app. A3-A7, details these relationships.

and only three of those were supplied by CMC. Two of those had no voting privilege, and any action could be taken only by unanimous agreement of all the directors. As the district court found on undisputed evidence, these entities maintained the formalities of incorporation, had their separate bank accounts, their own staff, and their own payroll. CMC did not control the day-to-day operations of SATOL. The sole connections between these entities is that CMI, Genstar Overseas and Federal Pacific contributed some personnel and some equipment to the joint venture.

REASONS THE WRIT SHOULD BE DENIED

1. Petitioners' Principal Arguments Are Rendered Moot by the Alternative Rulings.

Petitioners' petition should be denied because the decision of the Fifth Circuit is clearly correct, and furthermore, the issues raised in the petition do not meet the criteria for review by this Court.

The arguments raised by petitioners fall into three categories. First, they attack rulings that were in fact part of alternative holdings by the lower courts, which the petitioners studiously ignore. Once those alternative rulings are acknowledged, it becomes apparent that the petitioners' principal arguments are moot. Second, they attack rulings of the district court that are subject to an abuse of discretion standard, and the Fifth Circuit has already ruled there was no abuse of discretion. Third, they unabashedly ask this Court to engage in a sweeping review of firmly established legal concepts, such as the

entire doctrine of *forum non conveniens*. The Fifth Circuit rightly labeled many of the petitioners' arguments as "frivolous". Yet, petitioners repeat those arguments in this Court and couple those arguments with repeated assertions that the lower courts' view of the evidence is wrong. Petitioners clearly misperceive the role of this Court. As this Court has instructed, its role is not "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). It is the role of this Court to take up unsettled legal issues that are "of importance to the public, as distinguished from that of the parties . . . ." *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955), quoting from *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923). These precepts are embodied in Rule 10 of the Supreme Court Rules, which sets the standards for granting a writ of certiorari. None of the issues raised by petitioners satisfy that test.

The first issue raised by petitioners, which dominates the petitioners' petition, is whether the district court erred in addressing the motion to dismiss for lack of personal jurisdiction before addressing the motion to remand. Petitioners argue that by addressing the motion to dismiss first, the district court imposed an unfair burden on them to prove a prima facie case for the exercise of personal jurisdiction over the foreign defendants, whereas if the district court had addressed the motion to remand first the defendants would have been required to prove there was no possibility the foreign defendants could have been subjected to jurisdiction in Texas. As the Fifth Circuit pointed out, in making that argument the petitioners ignore the fact that the district court

addressed those two motions in the alternative. The district court properly exercised its discretion to first consider the motion to dismiss, as the Fifth Circuit ruled. *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1066 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 193 (1992); *Walker v. Savell*, 335 F.2d 536, 539 (5th Cir. 1964)[2]. But the district court did not stop there. The district court held in the alternative that if it considered the motion to remand first, the defendants proved there was no possibility that the foreign defendants were subject to personal jurisdiction in Texas. As the Fifth Circuit observed, that alternative ruling effectively renders moot petitioners' arguments concerning the proper sequence of decision on the two motions:

> Even if we could overrule our holding in *Walker* and require the district court to rule on the Villars' motion to remand first, the Villars' argument would still fail because the district court did as the Villars asked it to do: It applied the standard the Villars suggested and, alternatively, held that there was no possibility that the Villars could prove that the court had personal jurisdiction over the foreign defendants. The district court then denied the Villars'

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[2] Petitioners argue that *Walker v. Savell, supra*, is at odds with *Allen v. Ferguson*, 791 F.2d 611 (7th Cir. 1986). This clearly is not true, as the Fifth Circuit explained. The court in *Allen* ruled that a motion to dismiss should be considered before a motion to remand only where the state court could not obtain jurisdiction over the nondiverse defendant, as opposed to where there was simply a defect in process or the like. The lack of jurisdiction in the present case is not based on a defect in process, but is based instead on the lack of minimum contacts.

> motion to remand because the Villars had fraudulently jointed the non-diverse foreign corporations to defeat the district court's diversity jurisdiction.

990 F.2d at 1494-95; app. A102-A103.

The petitioners refuse to acknowledge that the very procedure and burden they advocate was in fact applied by the district court and affirmed by the Fifth Circuit. Their complaints on this point are moot.

There clearly was no possibility that Texas courts could have constitutionally subjected the foreign defendants to *in personam* jurisdiction, because the foreign defendants lacked sufficient minimum contacts with Texas. There are two types of *in personam* jurisdiction, specific and general. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984). In this case the petitioners relied on general jurisdiction. Further, to establish general jurisdiction, they relied on the foreign defendants' relationship to CMC to establish that jurisdiction. According to petitioners, CMC was the alter ego of all of the foreign defendants. The flaw in that position is that the undisputed evidence showed conclusively that CMC was not the alter ego of the foreign defendants. Respondents will not rehash the petitioners' arguments, all of which are based on palpably erroneous legal propositions and distorted views of the evidence. The opinions of the district court and the Fifth Circuit accurately review these matters and summarily dispose of the petitioners' arguments.

780 F. Supp. at 1475-80, app. A25-A47; 990 F.2d at 1496-97, app. A110-A116.[3]

2. The District Court Did Not Abuse Its Discretion in Denying Additional Discovery on the Jurisdictional Issue or in Disregarding the Affidavit of John Runion.

Petitioners assert two errors that are subject to review under an abuse of discretion standard. The Fifth Circuit ruled there was no abuse of discretion in refusing to permit petitioners to engage in additional discovery on the jurisdictional issue, and there was no abuse of discretion in disregarding the affidavit of John Runion. Petitioners never acknowledge the appropriate standard of review and, therefore, do not address the question

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[3] One of the arguments the Fifth Circuit labeled as "frivolous" is the proposition that GTO had sufficient minimum contacts with Texas because at the time of the accident GTO had an office in Texas. As the Fifth Circuit noted, that argument ignores the undisputed fact that GTO closed its office prior to the institution of this case and ended any contact with Texas. 990 F.2d at 1496, n. 6; app. A110 n. 6. Similarly frivolous is petitioners' contention that because Fednav's vessels may have visited Texas ports a few times over the span of several years, Fednav is subject to general jurisdiction in Texas. None of the contacts are sufficient to show the type of systematic and continuous contacts that would subject these defendants to general jurisdiction in Texas. Moreover, both the district court and the Fifth Circuit ruled that subjecting the defendants to jurisdiction in Texas would violate due process because it would "offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Petitioners have not even addressed that point in this Court.

whether there was an abuse of discretion. What petitioners are now asking is for this Court to review these issues, which are consequential to the present case only. These are not issues that warrant the granting of a writ of certiorari. Moreover, it is plain that the lower courts made the right rulings.

A. Both the district court and the Fifth Circuit acknowledged that the question of personal jurisdiction is not synonymous with the question of *forum non conveniens*. Both courts, however, realized that the evidence developed in the discovery that took place during the ten year pendency of this case in California was relevant to both issues. Despite that discovery, the petitioners have been unable to uncover any connections between the foreign defendants and Texas that would allow personal jurisdiction over these foreign defendants.

B. Unable to muster any concrete evidence, petitioners resorted to hiring John Runion, who purported to be an expert on international business matters. Despite considerable investigation, he too was unable to discover any factual evidence that would connect the foreign defendants to Texas. His affidavit, charitably put, is long on opinions and short on facts. Even though he possesses no legal expertise, he opined on numerous legal issues. He based those opinions on gross misstatements of the evidence and on unsupported assumptions of fact. The district court correctly disregarded that affidavit, which was the backbone of the petitioners' alter ego arguments. There was no evidence whatever that would have allowed a court to conclude that CMC was the alter ego of any of the foreign corporations.

3. The Fifth Circuit Correctly Affirmed the District Court's Dismissal for *Forum Non Conveniens*.

A. Petitioners raise a number of arguments about why the lower courts erred in dismissing this case for *forum non conveniens*. The first of those arguments is that the federal district court, rather than dismissing, should have remanded the case to state court. According to petitioners, justice demands that course. This argument neatly overlooks the fact that this is the third time this case has been dismissed by United States courts for *forum non conveniens*. Petitioners are essentially arguing that they should be allowed to go on a forum shopping expedition across the courts of this country until they find some court willing to hear their case. To allow that would nullify the three prior dismissals for *forum non conveniens*, which found that no court in the United States was a convenient one in which to try this case.

To accomplish their desired result, petitioners advocate a rule of law that would prevent a federal district court from ever dismissing a removed case for *forum non conveniens*. However, the authorities on which they rely hold simply that in a removed case a federal district court at times has discretion to remand rather than dismiss. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988); *Murray v. Union Pac. Ry. Co.*, 77 F. Supp. 613 (N.D. Ill. 1948). To succeed under those cases, the petitioners would have to prove that the district court abused its discretion in dismissing, rather than remanding. Considering the history of this case, no one can seriously argue that the district court abused its discretion in following the same course as the California federal and state courts.

Moreover, that is not an issue worthy of review by this Court.

B. Federal *forum non conveniens* law applies to cases in federal court. *Nolan v. Boeing Co.*, 919 F.2d 1058, 1068 n. 11 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 1587 (1991); *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 (5th Cir. 1987) (en banc), *vacated on other grounds sub nom Pan Am World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989), *affirmed in relevant part*, 883 F.2d 17 (5th Cir. 1989). Petitioners do not dispute this rule but contend it should not apply in a case removed from state court. In petitioners' world, in a suit filed initially in federal court on diversity grounds, federal *forum non conveniens* law should apply, but in a case removed from state court on diversity grounds, state *forum non conveniens* law should apply. Petitioners offer no logic and no authority for this facially absurd rule. Furthermore, as the Fifth Circuit observed (990 F.2d at 1498; app. A121-A122), in making the argument petitioners overlook the fact that this case had already been dismissed under federal standards in the prior California federal case.

C. Petitioners invite this Court to engage in a sweeping reexamination of the entire doctrine of *forum non conveniens*. According to petitioners, much has changed since the decision in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). Petitioners point to advances in telecommunications and the like. What petitioners do not explain is why the courts of the United States should become the courthouse to the world. Furthermore, they offer no alternative test. When their arguments are closely examined, it is apparent that they are simply complaining about the application of established *forum non conveniens* standards

to the facts of this case. The reason petitioners wish to litigate this matter in the United States has been recognized by the courts the world over: "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune." *Smith Kline & French Laboratories Ltd. v. Bloch* [1983] 1 W.L.R. 730 (1982), quoted in *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 289, 290 (5th Cir. 1984). That much has not changed and is a compelling reason for continuing to apply *forum non conveniens*.

Petitioners offer no rationale for allowing this case to proceed in the courts of the United States, and they do not explain why the whole doctrine of *forum non conveniens* should be reexamined.

4. The Fifth Circuit Correctly Ruled That the District Court Did Not Abuse Its Discretion in Imposing Sanctions on Petitioners' Counsel.

The district court imposed sanctions on petitioners' counsel for two reasons. First, petitioners' counsel made numerous frivolous arguments that were not supported by existing law or the facts. The Fifth Circuit observed, for example, that petitioners' alter ego argument was utterly at odds with the facts and the law. Second, petitioners submitted an affidavit that contained blatant misrepresentations of the evidence, which was either known to counsel or could have been easily discovered. This decision by the district court is reviewable under an abuse of discretion standard. *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384 (1990). The Fifth Circuit ruled that the district court had not abused its discretion. Petitioners do

not dispute the law under which the sanctions were imposed. Instead, they argue that imposing sanctions under the facts of this case will chill innovative advocacy. Innovative advocacy does not include making frivolous arguments that have absolutely no support in existing law or in the undisputed facts. Nor does it include submitting affidavits containing misrepresentations. Again, this is not the kind of issue that is worthy of review by this Court.

CONCLUSION

There is no reason to grant a writ of certiorari in this case. The decision of the Fifth Circuit is correct, is based on settled legal principles, and is not in conflict with any other circuit court of appeals. The writ should be denied.

Respectfully submitted,

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